No. 22,633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition To Review an Order of the National Labor Relations Board and Cross Petition for Enforcement

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INTERVENOR'S BRIEF

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INTERVENOR'S BRIEF

ISSUES PRESENTED FOR REVIEW

(1) Where, in a new and unorganized plant, a Company is separately advised at separate times by three unions of their intention to organize the employees, does an Employer violate Section 8(a)(2) and (1) of the Act when one of the three unions makes a claim of a majority status, and demands recognition, which claim is resolved and certified by means of a signature check of authorization cards submitted by the union to a Washington State Labor Mediator,

who—at the time of the execution of a "consent cross-check agreement"—was advised by the Company that other named unions had announced an interest in organizing its employees but had made no claim or demand for recognition upon the Company and thus were not "invited" by the Mediator to participate in the card check, the result being that the Company entered into a recognition agreement with the "certified" union?

(2) In the circumstances stated above, may a union rely upon clear and unequivocal authorization cards duly executed by an employee as proof of such majority status when the same employee has executed a duplicate card for another union but has never conveyed to the "claiming" union that it has revoked the use of such card in dealing with the employer in the employee's behalf?

STATEMENT OF THE CASE

No. 22,633 is before the Court on the petition of Intalco Aluminum Corporation to review an order of the National Labor Relations Board (hereafter called "the Board") issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), on February 21, 1968, against Intalco Aluminum Corporation (hereafter called "the Company").

On April 23, 1968, the Board filed its Answer and Cross-Petition for enforcement of that Order. The Board's Decision and Order as well as the Trial Examiner's Decision are reported at 169 NLRB No. 136 (R. 44-56; 87-89).[1]

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[1] References to the pleadings, decision and order of the Board and other papers reproduced as "Volume 1, Pleadings", are designated as "R."

References designated "D. & O." and "TXD" are to the Board's Decision and the Trial Examiner's Decision, respectively; "G.C. Ex.", "TX Ex.", "R. Ex.", and "Int. Ex.", are to General Counsel's, Trial Examiner's, Respondent's Exhibits, and Intervenor's Exhibits, respectively; "Tr." are to the transcript of proceedings before the Board.

On May 6, 1968, International Association of Machinists (hereafter called "the IAM") filed with the Court, its Motion for Leave to Intervene, which Motion was granted on June 4, 1968.

Three unions who were the charging parties in Board Case Nos. 19-CA-3346, 3347, and 3348, United Steelworkers of America, AFL-CIO; (hereafter called "the Steelworkers"); Aluminum Workers International Union, AFL-CIO; (hereafter called "Aluminum Workers"); and, Bellingham Metal Trades Council, Allied Industries Division (hereafter called "the Metal Trades"), respectively, did not intervene in this proceeding.

This Court has jurisdiction of the proceedings under Section 10(f) of the Act.

I. STATEMENT OF THE FACTS

The Board found that the Company violated Section 8(a)(2) and (1) of the Act, by granting recognition to the IAM, at a time when it was not the duly designated representative of the Company's employees within the meaning of Section 9(a) of the Act; and, that the IAM was a minority union. The essential facts upon which this finding rests, largely undisputed, are summarized below.

A. The Background Concerning Recognition

In early 1965 the Company, a Delaware corporation, with its principal offices located at Ferndale, Washington, commenced construction of its plant at that location. It is engaged in the production of aluminum (R. 46). The first hourly employee was hired in June 1965 (*ibid.*).

In the summer or fall of 1965, the representatives of the Aluminum Workers, the Steelworkers, and the IAM called upon the Company at its offices and announced "that they were going to try to organize the employees" (R. 46; Tr. 23, 25, 29). The Aluminum Workers did not commence organizing activity until November of 1965 (Tr. 88). The

Steelworkers commenced their activity sometime in the summer of 1965 (*ibid.*). The Metal Trades commenced an organizing campaign in March of 1966 (R. 46). No other contact with the Company was made by these representatives after 1965. There is nothing in the record that reflects that the Metal Trades representatives contacted the Company.

On March 10, 1966, the IAM by formal letter demanded recognition on the basis that it represented a majority of the employees and offered to prove its majority status by submitting its authorization cards to a third party for a card check (R. 47; Tr. 38; G.C. Ex. 2). On March 14, 1966, the Company answered the IAM's demand and agreed to meet the Union at the offices of Washington State Department of Labor and Industries on March 16, 1966 at 11 A.M. for the purpose of determining the validity of the claim (R. 46-47; Tr. 38; G.C. Ex. 3). At that meeting the IAM and the Company executed a "Stipulation of Agreement—Consent Cross-Check" (R. 47; Tr. 38; G.C. Ex. 4). The Company produced a list of 122 employees which was given to the State of Washington Mediator, Willard A. Olson (Tr. 38; G.C. Ex. 5). At the meeting the Company advised the Mediator that the Aluminum Workers and the Steelworkers were also interested in organizing its employees but had received no demand for recognition nor any claim from either of them (Tr. 61-62; 1093-1099). After the card and signature check Mr. Olson issued his "Certification on Conduct of Consent Cross-Check", dated March 16, 1966 (R. 48; Tr. 39; G.C. Ex. 6). As a consequence, the Company on that date entered into a "recognition agreement" with the IAM in which it agreed to recognize the IAM as the exclusive representative of its hourly production and maintenance employees (R. 88, at note 1; 48). On March 17, 1966 Mr. Olson issued a report to the parties finding, *inter alia,* that of the 122 employees' names submitted by the Company, the IAM presented 85 signed authorization cards, of which 81 authorization cards bore

genuine signatures checked against signatures of these employees in Company files (R. 48-49; Tr. 39-40; G.C. Ex. 7; Int. Ex. 1; Tr. 46).

B. The Subsequent Events

On March 18, 1966 in Case No. 19-RC-3896, the Aluminum Workers filed with the Board its petition for representation together with 44 authorization cards as provided in Section 9(a) of the Act (Tr. 48-51; 89; 95; G.C. Exs. 8; 9).[2] It was stipulated that copies of the petition were mailed by the Board on Friday, March 18, 1966 to the Company and to the IAM, and received by them on March 21, 1966 (Tr. 50-51). At the same time the Steelworkers in Case No. 19-CA-3346, the Aluminum Workers in Case No. 19-CA-3347, and the Metal Trades in Case No. 19-CA-3348, filed "blocking" charges alleging violations of 8(a)(2) and (1) of the Act (R. 3, 4, 5).[3] Amended charges were subsequently filed on April 29, 1966 (Aluminum Workers), and May 9, 1966 (Steelworkers and Metal Trades) (R. 6, 7, 8). On May 11, 1966 the Board issued its Complaint, which was amended on August 5, 1966 (R. 9-13; 20). An Answer to the Complaint, and an Amended Answer was filed on June 17, 1966, and August 11, 1966 by the Company (R. 17-19; 21-23).

Between March 16, 1966—the date of the execution of the recognition agreement—and April 14, 1966, the Company negotiated and entered into a formalized collective bargaining agreement with the IAM which had its termination date July 1, 1968 (Tr. 177; G.C. Ex. 11).

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[2] The petition was not withdrawn, and is still pending before the Board.

[3] A "blocking" charge in Labor parlance forecloses an investigation under Section 9(a) of the Act, unless a so-called "*Carlson's Furniture*" waiver is filed by the charging unions (*Carlson's Furniture Industries, Inc., et al.*, 153 NLRB 162).

C. The Complaint and the Issues Upon Which the Case Was Tried

The entire theory under which this case was tried by the General Counsel and the charging parties was (1) that the IAM's majority status was tainted by "reason of fraud in the inducement of employees to execute authorization cards" (R. 27-28); and, (2) that there was not a representative complement of employees in the plant at the time of recognition (R. 11; "Complaint", par. 8(b)).[4]

The latter issue was resolved by both the Trial Examiner and the Board against the General Counsel when they both found that there existed a question of representation at the time of recognition of the IAM by the Employer (R. 52; TDX: Concluding Findings; lines 31-32; R. 88; D. O., p. 2).

As to the former issue, neither the Trial Examiner nor the Board made *any* credibility resolutions with respect to the testimony concerning the thirty-odd witnesses called by the General Counsel (*Ibid.*).

After the matter had been duly litigated by all parties before the Trial Examiner, subsequent exceptions and cross-exceptions were filed and briefed to the Board (R. 56; 59; 66; 78; 79; 81).

D. The Trial Examiner's and the Board's Conclusions

Both the Trial Examiner and the Board concluded and found that because 30 of the authorization cards secured by the IAM were signed by employees who also signed cards for one of the other unions, these 30 cards are insufficient to establish the signers' selection of the IAM as the exclusive bargaining representative, and, accordingly the IAM at the time of recognition was a minority union and not the duly designated representative of the Company's employees within the meaning of Section 9(a) of the Act (R. 88-89).

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[4] This issue, in a normal representation proceeding is known as an "expanding unit" theory (*General Extrusion Co., Inc.*, 121 NLRB 1165).

In reaching this conclusion, the Board reasoned that at the time of recognition of the IAM, other unions, who were then known to the Company and the IAM to be engaged in organizing the employees were not afforded an opportunity to participate in the State-conducted card check; that the "consent agreement" was in effect a recognition by the parties that a "question concerning representation" existed; that the investigation and resolution of that question was not attended by appropriate safeguards—namely, inviting other unions to participate in the card check; and, that the Company thus acted at its peril in relying on the State certification of the IAM as the representative of its employees (*Ibid.*).

On these conclusions the Board adopted as its Order the Order and Recommended Order of the Trial Examiner (R. 89; 55).

ARGUMENT

I.

An employer may recognize a union as the bargaining representative so long as the union represents a majority of the employees and no election is required to establish the union's majority status (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; 72 at note 8). Indeed, absent a good faith doubt as to the union's majority it is the employer's duty to grant recognition to the requesting union (*Snow* v. *N. L. R. B.*, 308 F. 2d 687; 691 (C. A. 9).

In this case, at the time the employer granted recognition there was an ample showing of the union's majority status. The Board would detract from the employer's reliance upon this ample majority showing on the ground that when recognition was granted it knew that other unions were engaged in organizing the employees. But this circumstance alone cannot bar recognition of a union which has attained majority status. Recognition is not to be delayed, and collective bargaining deferred, because other

unions have an interest in organization. The interest of competing unions must reach a level of organizing intensity so that the employer may fairly be said to have *known* the rival unions have gained a substantial hold (*N. L. R. B.* v. *Wheland Company,* 271 F. 2d 122; 124 (C. A. 6). And mere "interest" is not the equivalent to a claim by an organization that it represents a majority of the employees and requests bargaining rights. Nor can mere "interest" of a rival labor organization or "campaigning" be equated with or given the stature of a majority claim or even a "bare" claim of representation (*The Baldwin Company,* 81 N.L.R.B. 927-929).

In the case before this Court the facts have been adequately explicated but this summary in the context here may illuminate the problem. Here, three union representatives call upon an employer to advise him that they desire to organize his employees. Each of them called upon him at separate times. At all times he remained neutral. There was no patent organizing activity and no contact with the employer by any of the union representatives between December 1965 and March 1966. In March 1966 he received the majority claim and an offer to prove the claim through a neutral party from the IAM. At which point a card check was made by the neutral party—a State mediator. The employer advised the Mediator at that time, that he had been approached by the Aluminum Workers and the Steelworkers of their desire to organize the employees but he had received no demand for recognition from either union. And it was not until two days *after* the recognition agreement was executed that the pyrotechnics began. Suddenly, a petition was filed together with simultaneous 8(a)(2) charges which, under normal circumstances, would "block" the processing of the petition to an election. The petition was *not* dismissed as untimely because the contract had been signed as was the case in *N.L.R.B.* v. *Airmaster Corporation,* (339 F. 2d 553; 555 (C. A. 3)). Instead we were charged with fraud and misrepresentation in the

method our cards were obtained. But it does not suffice to destroy the ample showing of majority status for the Board to say that 30 employees signed cards for other unions as well as the IAM, in the absence of clear proof of fraud or coercion (see e.g., *N. L. R. B.* v. *Fosdal,* 367 F. 2d 784; 786-787 (C. A. 7); *Joy Silk Mills, Inc.,* 85 N.L.R.B. 1263, *enfd.* 185 F. 2d 732 (C. A. D. C.), *cert. denied* 341 U.S. 914; *Iowa Beef Packers, Inc.* v. *N. L. R. B.,* 331 F. 2d 176 (C. A. 8).

These employees never informed either the Employer or the Intervenor that they had repudiated the IAM's authorization to act as their agent. The Employer and the IAM were therefore entitled to rely on the designation of the IAM, no repudiation having been communicated to them by the employees (*Jas. H. Matthews & Co.* v. *N. L. R. B.,* 354 F. 2d 432, 438 (C. A. 8); *Phil-Modes, Inc.,* 159 N.L.R.B. 944, 950; (*Restatement* (2d) *Agency,* § 119 (c) (1958). Moreover, the lesson of *Keller Plastics Eastern, Inc.,* (157 N.L.R.B., 583) is to the contrary. There, the Board decided at page 586, that in situations involving "a bargaining status established as a result of [the employer's] voluntary recognition of a majority representative, . . . like situations involving certifications, . . . the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining." The Board, in that case, accepted the Respondent's assertion that at the time it executed the contract it was unaware of the Union's loss of a majority status, and also the fact that there was nothing in the record to indicate that the Respondent was *aware* of the presence of the Teamsters Union, the charging party in the case (*Id.* p. 587, Note 4) (See also, *Retail Clerks Union, Local 770* v. *N. L. R. B.,* 370 F. 2d 205, (C. A. 9).

In the circumstances of this case, the most that the duplicatory cards would have justified was an election (See, *Rheingold Breweries, Inc.,* 162 N.L.R.B., No. 32; *Sound Contractors Association,* 162 N.L.R.B. No. 45). But the

rival unions did not wish an election because while filing a representation petition under Section 9(a), they also filed an 8(a)(2) charge that "blocked" an election. The 8(a)(2) charge was dismissal as totally devoid of merit that a "real" or "genuine" question concerning representation existed as to these three unions (See, *Diana Shops of Washington State, Inc.,* 170 N.L.R.B. No. 54, released March 28, 1968 at page 4, note 2 where the Board in an 8(a)(5) situation implied that where there is evidence that a "blocking" charge is filed for the purpose of blocking an election the Board will consider this among other circumstances in connection with a *pending petition* or a refusal to bargain (see also, *Carlson's Furniture Industries, Inc., supra*). Thus had the rival unions actually thought that their so-called showing of interest would enable them to win an election, they could and would have proceeded to one. That they did not proceed with the processing of the Petition, convincingly shows that they themselves recognized that the IAM was the majority choice. They simply used the Board's processes to gain time within which they hoped to gain a majority. But the existing IAM majority was ample legal basis for the grant of recognition (*I. L. G. W. U., AFL-CIO (Bernhard-Altmann Texas Corp.)* v. *N. L. R. B.,* 366 U.S. 731; 738; *Retail Clerks Union, Local 770* v. *N. L. R. B.,* 370 F. 2d 205 (C. A. 9); *cf. Midwest Piping,* 63 N.L.R.B. 1060; *N. L. R. B.* v. *Airmaster Corporation,* 339 F. 2d 553 (C. A. 3).

In any event, had the Board concluded in its investigation that a real question of representation existed at the time of recognition and despite the State Board certification it was not preempted from proceeding promptly in resolving the issue (*San Diego Building Trades* v. *Garmon,* 359 U.S. 236; 239; *Rheingold, (supra); Sound Contractors, (supra); Weber* v. *Anheuser Busch,* 348 U.S. 468; 481).

Moreover, duplicate authorization cards signed by the same employee for different unions do not render these cards invalid or void for purposes of a card check where,

as here, the authorization cards were free from ambiguity or misrepresentation. All that was required under the circumstances was the Company's good faith in dealing with the IAM's demand for recognition as this was the only issue before it at that time (*Bernhard-Altmann, (supra); Retail Clerks Union, Local 770, supra; Airmaster Corporation, supra*). In *Local 1325, Retail Clerks International Association, AFL-CIO* v. *N. L. R. B., et al.,* 325 F. 2d 293, (C. A. 1), the Court, in a situation not too dissimilar from the facts in this case, said at pages 294-295:

> '['W]e see no great hardship on [these] particular union[s] in view of [their] complete lack of diligence.* But even if there were hardship, the present rule would suspend a Damoclesian sword over every instance where an employer innocently accepted, legitimate accommodation to an organizational campaign. We do not think this admittedly highly unusual case should be permitted to make bad general law.''
>
> ''* The rival union in this case neither kept an eye on what the successful union was doing openly, nor, after the employer ignored its request did it pursue the matter. There was a considerable interval between the making of the request, the card check and actual recognition of the successful union, and the negotiating of the collective bargaining agreement.''

Assuming, *arguendo,* that the Court sustains the Board's Order enforcing the 8(a)(2) violation, in our view, absent a finding of an independent 8(a)(1) which the Board did *not* find, and under the peculiar circumstances of this case, the remedy of reimbursement of dues and other monies exacted under the contract is more in the nature of a penalty rather than a remedy to be exacted against the Company. To enforce this order under these circumstances is to permit a ''windfall'' to the employees who have benefited by the collective agreement (*Hughes & Hatcher, Inc.,* v. *N. L. R. B.,* 393 F. 2d 557 (1968), (C. A. 6).

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue an order denying enforcement of the Decision and Order of the National Labor Relations Board.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), are as follows:

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * *

Sec. (8) (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *.

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates

of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . .

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 . . . (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or

set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.